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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Sylvia Garza,
Plaintiff,
vs.
Michael J. Astrue, Commissioner of Social Security,
Defendant.

No. CV 07-1948-PHX-JAT

ORDER

Plaintiff appeals the Social Security Commissioner's denial of disability benefits. The Court now rules on Plaintiff Sylvia Garza's Motion for Summary Judgment (Doc. #18) and Defendant Commissioner's Cross Motion for Summary Judgment (Doc. #22).

I. Background

A. Procedural Background

Plaintiff, Sylvia Garza, filed an application on November 15, 2004 for Supplemental Security and Disability Insurance benefits based on a combination of physical impairments. (Tr. 17). The Agency denied the claim initially and upon reconsideration. On January 31, 2007, an Administrative Law Judge ("ALJ") issued an unfavorable decision after a hearing. (Tr. 14-22). The ALJ's decision became the final decision of the Commissioner on August 11, 2007, when the Appeals Council denied review. (Tr. 7).

1 Dr. Malcolm McPhee, a specialist in physical medicine and rehabilitation, reviewed
2 Ms. Garza's medical records and performed a consultative examination of her on April 11,
3 2005. (Tr. 197-201). Dr. McPhee diagnosed Ms. Garza with diffuse myofascial tenderness
4 of the lumbar spine. (Tr. 197-201). Dr. McPhee opined that Ms. Garza could, in particular,
5 lift and carry 50 pounds occasionally and 25 pounds frequently. (Tr. 197-201).

6 Treating records from May 21, 2005, show that Ms. Garza complained of numerous
7 ailments, including: left-sided back and hip pain, headaches, right blurry vision, allergies,
8 fatigue, left ankle pain, and stiffness in the arm. (Tr. 223-24). She was diagnosed with
9 lumbar discogenic disease, metabolic syndrome, previous gallbladder removal, elevated liver
10 function, and radicular pain. (Tr. 223-224). The doctor prescribed Vicodin. (Tr. 224).

11 In June 2005, the results of a bone densitometry came back within normal limits. (Tr.
12 246). Also in June 2005, an MRI revealed mild central spinal stenosis and mild left-sided
13 neuroforaminal stenosis at L4-S1 and moderate to severe degenerative disc space and small
14 posterior disc protrusion, which did not compromise the spinal canal, at L5-S1. (Tr. 242).

15 In an undated opinion, sent by fax on September 21, 2005, Dr. Wayne Finley, Ms.
16 Garza's treating physician, wrote that Ms. Garza suffered from degenerative disc disease of
17 the lumbar spine and bilateral hip pain. (Tr. 249). Dr. Finley opined, in particular, that Ms.
18 Garza could stand or walk only from 2 to 6 hours a day, could sit less than six hours a day,
19 and could lift 10 pounds occasionally and less than 10 pounds frequently. (Tr. 249-5).

20 In October of 2005, Ms. Garza was treated for mild diabetes mellitus, arthritis, and
21 spinal stenosis. (Tr. 211). The doctor referred her to an orthopedist, but did not believe that
22 referral to a neurologist was appropriate in the absence of radicular symptoms. (Tr. 212).
23 On October 11, an unidentified doctor wrote a one-sentence note on a form that Ms. Garza
24 was "unable to work *at this time*, secondary to spinal stenosis of back." (Tr. 290)(emphasis
25 added).

26 On November 16, 2005, Dr. Neil McPhee reviewed Ms. Garza's updated treatment
27 records and diagnostic studies and examined Ms. Garza. (Tr. 183-88). Dr. McPhee noted
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1 that Ms. Garza had received only conservative treatment with Ibuprofen, Tylenol No. 3, and
2 Vicodin. (Tr. 183). On examination, Dr. McPhee found mostly normal results with, in
3 particular, negative straight leg raising test and largely normal ranges of motion, although
4 Ms. Garza complained of low back discomfort with bending and lower back tenderness. (Tr.
5 184). Dr. McPhee opined that, in an eight-hour work day, Ms. Garza could lift or carry 20
6 pounds occasionally and 10 pounds frequently. (Tr. 184). He further opined that she would
7 not be restricted in sitting, standing, or walking, as long as she could take breaks hourly for
8 a few minutes. (Tr. 184). On December 5, 2005, a State Agency physician concurred with
9 Dr. McPhee's opinion.

10 On February 17, 2006, Family Nurse Practitioner Emily McWinters referred Ms.
11 Garza to "home health" care for Ms. Garza to receive help with home care. (Tr. 290).

12 On April 25, 2006, Ms. Garza was treated for increased lumbar pain. (Tr. 293). She
13 was prescribed Tylenol No. 3 and Motrin. (Tr. 293).

14 A July 17, 2006 MRI revealed a broad-based right posterior paramedial disc
15 extrusion, which extended into the neural foramen, but no significant neurological problems.
16 (Tr. 295-96).

17 On August 10, 2006, Ms. Garza sought treatment for reported increased lumbar back
18 pain with pain radiating down the left leg. (Tr. 292).

19 On September 12, 2006, Dr. Glen Bair, Ms. Garza's treating orthopedist, reviewed her
20 MRI and made mostly normal findings upon examination. (Tr. 297). In particular, straight
21 leg raising test in the sitting position was not uncomfortable and back range was minimally
22 decreased for reflexes. (Tr. 297). Dr. Bair recommended a home exercise program and
23 weight loss and did not feel that narcotic pain medication was appropriate. (Tr. 297).

24 On January 4, 2007, Ms. Garza consulted with Dr. Amrani at Desert Valley Spine.
25 Dr. Amrani made mostly normal findings on examination, but noted straight leg raising
26 reproduced back pain at 90 degrees on each side. (Tr. 299). Dr. Armani did not believe that
27 surgery was appropriate and referred Ms. Garza to pain management for evaluation. (Tr.
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1 299).

2 **II. Standard of Review**

3 A district court:

4 may set aside a denial of disability benefits only if it is not supported by
5 substantial evidence or if it is based on legal error. Substantial evidence means
6 more than a mere scintilla but less than a preponderance. Substantial evidence
7 is relevant evidence, which considering the record as a whole, a reasonable
8 person might accept as adequate to support a conclusion. Where the evidence
9 is susceptible to more than one rational interpretation, one of which supports
10 the ALJ's decision, the ALJ's decision must be upheld.

11 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (internal citation and quotation
12 omitted). This is because “[t]he trier of fact and not the reviewing court must resolve
13 conflicts in the evidence, and if the evidence can support either outcome, the court may not
14 substitute its judgment for that of the ALJ.” *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th
15 Cir. 1992). Also under this standard, the Court will uphold the ALJ’s findings if supported
16 by inferences reasonably drawn from the record. *Batson v. Comm’r of the Social Security
17 Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). However, the Court must consider the entire
18 record as a whole and cannot affirm simply by isolating a “specific quantum of supporting
19 evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007)(internal quotation omitted).

20 **III. Discussion**

21 To qualify for disability benefits under the Social Security Act a claimant must show,
22 among other things, that she is “under a disability.” 42 U.S.C. §423(a)(1)(E). The Act
23 defines “disability” as the “inability to engage in any substantial gainful activity by reason
24 of any medically determinable physical or mental impairment which can be expected to result
25 in death or which has lasted or can be expected to last for a continuous period of not less than
26 12 months.” 42 U.S.C. §423(d)(1)(A). A person is

27 under a disability only if his physical or mental impairment or impairments are
28 of such severity that he is not only unable to do his previous work but cannot,
considering his age, education, and work experience, engage in any other kind
of substantial gainful work which exists in the national economy.

42 U.S.C. §423(d)(2)(A).

1 The Social Security regulations set forth a five-step sequential process for evaluating
2 disability claims. 20 C.F.R. §404.1520; *see also Reddick v. Chater*, 157 F.3d 715, 721 (9th
3 Cir. 1998). A finding of “not disabled” at any step in the sequential process will end the
4 inquiry. 20 C.F.R. §404.1520(a)(4). The claimant bears the burden of proof at the first four
5 steps, but the burden shifts to the Commissioner at the final step. *Reddick*, 157 F.3d at 721.
6 The five steps are as follows:

7 1. First, the ALJ determines whether the claimant is “doing substantial gainful
8 activity.” 20 C.F.R. §404.1520(a)(4)(i). If so, the claimant is not disabled.

9 2. If the claimant is not gainfully employed, the ALJ next determines whether the
10 claimant has a “severe medically determinable physical or mental impairment.” 20 C.F.R.
11 §404.1520(a)(4)(ii). To be considered severe, the impairment must “significantly limit[] [the
12 claimant's] physical or mental ability to do basic work activities.” 20 C.F.R. §404.1520(c).
13 Basic work activities are the “abilities and aptitudes to do most jobs,” for example: lifting;
14 carrying; reaching; understanding, carrying out and remembering simple instructions;
15 responding appropriately to co-workers; and dealing with changes in routine. 20 C.F.R.
16 §404.1521(b). Further, the impairment must either be expected “to result in death” or “to last
17 for a continuous period of twelve months.” 20 C.F.R. §404.1509 (incorporated by reference
18 in 20 C.F.R. §404.1520(a)(4)(ii)). The “step-two inquiry is a de minimis screening device
19 to dispose of groundless claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). If
20 the claimant does not have a severe impairment, the claimant is not disabled.

21 3. Having found a severe impairment, the ALJ next determines whether the
22 impairment “meets or equals” one of the impairments listed in the regulations. 20 C.F.R.
23 §404.1520(a)(4)(iii). If so, the claimant is found disabled without further inquiry. If not,
24 before proceeding to the next step, the ALJ will make a finding regarding the claimant's
25 “residual functional capacity based on all the relevant medical and other evidence in [the]
26 record.” 20 C.F.R. §404.1520(e). A claimant's “residual functional capacity” is the most he
27 can do despite all his impairments, including those that are not severe, and any related
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1 symptoms. 20 C.F.R. §404.1545(a)(1).

2 4. At step four, the ALJ determines whether, despite the impairments, the claimant
3 can still perform “past relevant work.” 20 C.F.R. §404.1520(a)(4)(iv). To make this
4 determination, the ALJ compares its “residual functional capacity assessment . . . with the
5 physical and mental demands of [the claimant's] past relevant work.” 20 C.F.R.
6 §404.1520(f). If the claimant can still perform the kind of work he previously engaged in,
7 the claimant is not disabled. Otherwise, the ALJ proceeds to the final step.

8 5. At the final step, the ALJ determines whether the claimant “can make an
9 adjustment to other work” that exists in the national economy. 20 C.F.R. §404.1520(a)(4)(v).
10 In making this determination, the ALJ considers the claimant's “residual functional capacity”
11 and his “age, education, and work experience.” 20 C.F.R. §404.1520(g)(1). If the claimant
12 can perform other work, he is not disabled. If the claimant cannot perform other work, he
13 will be found disabled. As previously noted, the Commissioner has the burden of proving
14 the claimant can perform other work. *Reddick*, 157 F.3d at 721.

15 In this case, the ALJ concluded at step four of the sequential process that Ms. Garza
16 was not disabled. The ALJ found that Plaintiff was capable of performing her past relevant
17 sedentary work as a clerical worker, customs service representative/manager, account
18 manager, and typist “because these jobs do not require the performance of work-related
19 activities precluded by the claimant’s residual functional capacity.” (Tr. 21). The ALJ
20 therefore found that Plaintiff had not been under a “disability” since June 17, 2004 and
21 denied benefits. (Tr. 21-22).

22 On appeal, Plaintiff does not allege the ALJ erred in his findings at steps one through
23 three of the sequential evaluation process. Plaintiff does contend that the ALJ incorrectly
24 assessed her residual functional capacity and erred in finding she could perform her past
25 work. Ms. Garza argues that: 1) the ALJ failed to properly consider her subjective complaint
26 testimony and 2) the ALJ failed to properly weigh the opinions of her treating physicians.

1 **A. Subjective Pain Testimony**

2 The ALJ found Ms. Garza’s complaints regarding the degree of her pain and
3 impairments “not credible to the extent alleged.” (Tr. 21). If a claimant produces objective
4 medical evidence of an underlying impairment, as Ms. Garza did here, then the ALJ cannot
5 reject the claimant’s subjective complaints based solely on a lack of objective medical
6 support for the alleged severity of the pain. *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir.
7 2001). If the ALJ finds the claimant’s subjective pain testimony not credible, the ALJ must
8 make findings sufficiently specific to allow the reviewing court to conclude that the ALJ
9 rejected the testimony on permissible grounds and did not arbitrarily discredit the claimant’s
10 testimony. *Id.* at 856-57. If no affirmative evidence of malingering exists, then the ALJ must
11 provide clear and convincing reasons for rejecting the claimant’s testimony about the severity
12 of her symptoms. *Id.* at 857.

13 Because no affirmative evidence of malingering exists, the ALJ had to provide clear
14 and convincing reasons for disbelieving Ms. Garza’s reports of the severity of her pain. The
15 ALJ offered the following reasons for not fully crediting Plaintiff’s subjective complaints:

16 First, neurological examinations by the consultative examining
17 doctor and by her treating physician were normal. Second, she
18 requires no ambulatory devices. Third, she testified that she
19 now weighs 160 pounds (has lost weight). Fourth, with regard
20 to activities of daily living, she provides care for three minor
21 children, ages three, five, and fifteen. She also drives. Her
22 activities of daily living are consistent with a conclusion that she
23 would be able to perform light work.

24 (Tr. 21).

25 Regarding the ALJ’s first reason, “while subjective pain testimony cannot be rejected
26 on the sole ground that it is not fully corroborated by objective medical evidence, the medical
27 evidence is still a relevant factor in determining the severity of the claimant’s pain and its
28 disabling effects.” *Rollins*, 261 F.3d at 857 (citing 20 C.F.R. §404.1529(c)(2)). The Court
finds the ALJ legitimately considered the lack of corroborating medical evidence for
Plaintiff’s claimed level of pain.

1 The Court finds the ALJ's second reason also supports his credibility determination.
2 Plaintiff testified that on a pain scale of one to ten, with ten being the worst pain, she would
3 rate her average pain at an eight. (Tr. 336). The ALJ noted that Plaintiff does not use any
4 ambulatory devices, such as a cane or any other device, to help her stand up, get in and out
5 of a seat, bed, etc. The ALJ could find that Plaintiff's ability to function without the aid of
6 an ambulatory device is inconsistent with such an extreme pain level.

7 The ALJ's third stated reason for discounting Plaintiff's subjective complaints was
8 that, at 160 pounds, she had lost weight. Without further elaboration, the Court cannot
9 determine the ALJ's reasoning behind that comment. The Court therefore finds that
10 Plaintiff's weight loss is not a clear and convincing reason for doubting her credibility.

11 The ALJ's fourth reason involves a discrepancy between Plaintiff's daily activities
12 and her reported amount of pain. The ALJ noted that Plaintiff cared for her three minor
13 children, ages three, five, and fifteen, and that she could drive. An ability to care for small
14 children and perform housekeeping duties can cut against a claimant's subjective complaints
15 of severe pain. *See e.g., Thomas*, 278 F.3d at 959; *Rollins*, 261 F.3d at 857. Although Ms.
16 Garza's testimony was somewhat equivocal about how well she could keep up with her
17 activities without the help of her older children, and the ALJ's interpretation of her testimony
18 might not be the only reasonable interpretation, it is still a reasonable interpretation that is
19 supported by substantial evidence. *Rollins*, 261 F.3d at 857. It is not the Court's role to
20 second-guess the ALJ. *Id.*

21 The Court finds that with his first, second, and fourth reasons, the ALJ met his burden
22 of providing clear and convincing reasons for rejecting Plaintiff's subjective pain testimony.
23 The ALJ's reasons were sufficiently specific to allow the Court to determine that the ALJ did
24 not arbitrarily discredit Ms. Garza's testimony. *Id.* at 856-57.

1 **B. Treating Physician Opinions**

2 Plaintiff argues that the ALJ did not attribute sufficient weight to the medical opinions
3 of her treating physicians. By rule, the Social Security Administration favors treating
4 physician opinions over non-treating physicians. *Orn*, 495 F.3d at 631 (citing 20 C.F.R.
5 §404.1527). In addition, the Administration favors examining physician opinions over
6 opinions of non-examining physicians. *Id.*

7 If a treating physician’s opinion is well-supported by medically acceptable clinical and
8 laboratory diagnostic techniques and is not inconsistent with the other substantial evidence
9 in the case, then it is given “controlling weight.” *Id.* If a treating physician’s opinion is not
10 sufficiently supported by medical evidence and other substantial evidence in the case,
11 however, the ALJ need not give the opinion controlling weight. *Id.* Further, even when a
12 treating doctor’s opinion is given the most weight in a disability case, the opinion is not
13 binding on the ALJ regarding the existence of an impairment or the ultimate determination
14 of disability. *Batson*, 359 F.3d at 1195.

15 If the treating doctor’s opinion is contradicted by another doctor, the ALJ may reject
16 the treating doctor’s opinion by giving specific and legitimate reasons for doing so, rather
17 than having to give clear and convincing reasons. *Orn*, 495 F.3d at 632. An ALJ meets his
18 burden of providing specific and legitimate reasons for rejecting a treating physician’s
19 opinion if the ALJ sets out a detailed and thorough summary of the facts and conflicting
20 clinical evidence, stating his interpretation thereof, and making findings. *Id.*

21 The Court disagrees with Ms. Garza that Dr. Finley’s opinion is entitled to controlling
22 weight. When filling out his Medical Source Statement of Ability to Do Work-Related
23 Activities, Dr. Finley explicitly based his findings and conclusions on Plaintiff’s reports of
24 back and hip pain. (Tr. 249-51). An ALJ can give little weight to a treating doctor’s opinion
25 when the opinion is based on a claimant’s subjective complaints. *Bayliss v. Barnhart*, 427
26 F.3d 1211, 1217 (9th Cir. 2005); *Batson*, 359 F.3d at 1195. Moreover, the Court has already
27 held that the ALJ properly discredited Plaintiff’s subjective pain testimony. The Court finds
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1 that Dr. Finley’s assessment of Plaintiff’s capabilities is not well-supported by clinical
2 findings and other substantial evidence in the record.

3 Also, nothing in the October 2005 opinion, allegedly by treating physician Dr. Hiler,
4 that Plaintiff “is unable to work *at this time*” due to spinal stenosis (Tr. 290) contradicts the
5 ALJ’s finding. In order for Plaintiff to be under a disability, she must be unable to work for
6 at least twelve months. Nothing about the phrase “at this time” suggests a duration of a year,
7 as required for a disability finding. Moreover, this brief note does not have any supporting
8 objective medical evidence. The ALJ therefore did not have to give any significant weight
9 to the notation. *See Bayliss*, 427 F.3d at 1216 (“[A]n ALJ need not accept the opinion of a
10 doctor if that opinion is brief, conclusory, and inadequately supported by clinical findings.”).

11 In addition, treating physician Dr. Amrani’s report regarding Plaintiff’s MRI does not
12 conflict with the ALJ’s residual functional capacity assessment. While noting degenerative
13 disk disease at L4-5 and a small central and right-sided disk bulge at L5-S1, nothing in Dr.
14 Amrani’s chart note contradicts the ALJ’s determination that Plaintiff could perform
15 sedentary work. (Tr. 299).

16 Moreover, the opinion of one of Plaintiff’s treating physicians, Dr. Bair, supports the
17 ALJ’s conclusion regarding her functional capacity. After reviewing her most recent MRI,
18 Dr. Bair reported that he was “less impressed than the radiologist.” (Tr. 297). Although he
19 reported disc space bulging at L4-5 and L5-S1, he did not believe those conditions could
20 cause leg pain and noted that Superior levels were normal. (Tr. 297). Upon examining
21 Plaintiff, he found that her gait and station were normal, that she could get up on her heels
22 and toes, could squat and rise, and could kick at the level of the waist. (Tr. 297). Dr. Bair
23 found that Plaintiff’s back range of motion was only minimally decreased. (Tr. 297). He
24 further noted that Plaintiff could perform a straight leg raise from a sitting position without
25 discomfort. (Tr. 297). In the treatment plan section of his report, Dr. Bair recommended a
26 home exercise program and weight loss, but did not recommend narcotic medications. (Tr.
27 297).

1 Finally, the Court disagrees with Plaintiff that the opinions of the treating physicians
2 were uncontradicted. Because their opinions were contradicted by record evidence, the ALJ
3 only had to give specific and legitimate for rejecting the opinions. *Orn*, 495 F.3d at 632.
4 The Court finds that the ALJ did that by setting out a thorough summary of the facts and
5 conflicting clinical evidence, stating his interpretation thereof, and making findings. *Id.* The
6 Court holds that the ALJ properly considered and weighed the medical evidence in this case.
7 Moreover, when the evidence supports either confirming or reversing the ALJ's decision, the
8 Court may not substitute its judgment for that of the ALJ. *Batson*, 359 F.3d at 1196.

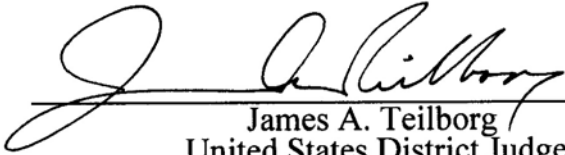
9 Because the ALJ properly discredited Ms. Garza's testimony regarding the level of
10 her pain and properly considered and resolved the conflicts in the medical evidence, the
11 Court will affirm the decision of Commissioner.

12 Consequently,

13 IT IS HEREBY ORDERED GRANTING Defendant Commissioner's Cross Motion
14 for Summary Judgment (Doc. #22).

15 IT IS FURTHER ORDERED DENYING Plaintiff Sylvia Garza's Motion for
16 Summary Judgment (Doc. #18).

17 DATED this 23rd day of March, 2009.

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22 James A. Teilborg
23 United States District Judge
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